

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

NOV 18 2009

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0185-PR
	)	2 CA-CR 2009-0231-PR
	)	(Consolidated)
v.	)	DEPARTMENT B
	)	
ROBIN GULLEDGE-FORGA,	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
Petitioner.	)	Rule 111, Rules of
	)	the Supreme Court

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20011606

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

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Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Mike Jette

Tucson  
Attorneys for Respondent

Creighton Cornell, P.C.  
By Creighton Cornell

Tucson  
Attorney for Petitioner

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V Á S Q U E Z, Judge.

¶1 In these consolidated petitions for review, petitioner Robin Gulledge-Forga seeks review of the trial court's orders dismissing as untimely a petition for post-conviction relief she filed pursuant to Rule 32, Ariz. R. Crim. P.; denying her two motions for reconsideration; and denying her request to file a delayed petition for post-conviction relief pursuant to Rule 32.1(f). We will not disturb a trial court's denial of post-conviction relief unless the court has clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no such abuse.

¶2 In October 2001, Gulledge-Forga admitted having obtained \$267,614.02 by means of a fraudulent scheme or artifice in violation of A.R.S. § 13-2310. She agreed to pay up to \$1,050,000 in restitution to three victims identified in her plea agreement. The trial court sentenced her on November 16, 2001, to an aggravated, twelve-year prison term and ordered restitution totaling \$595,623.81. Contemporaneously, Gulledge-Forga signed the customary form notice of post-conviction rights, which informed her she had ninety days from the entry of judgment and sentence in which to file a notice of post-conviction relief pursuant to Rule 32. *See* Ariz. R. Crim. P. 32.4(a). Her notice was due by February 14, 2002.

¶3 On November 6, 2008, retained counsel filed Gulledge-Forga's notice pursuant to Rule 32. Eleven days later, he moved for leave to take the deposition of Gulledge-Forga's trial counsel in order to develop potential claims of ineffective assistance of counsel. At a hearing in December 2008, the trial court denied the motion, finding that it had no authority

to compel a deposition but that trial counsel was willing to talk to Gullledge-Forga's post-conviction counsel in any event.

¶4 Counsel filed a "partial petition" for post-conviction relief in March 2009, more than seven years after the time for seeking such relief had expired. The trial court dismissed the petition as untimely and denied Gullledge-Forga's motion for reconsideration of its ruling, giving rise to one of the two petitions for review now before us. As part of her motion for reconsideration, Gullledge-Forga alternatively sought leave to file a delayed petition for post-conviction relief pursuant to Rule 32.1(f), arguing the failure to file a timely petition was entirely the fault of her trial counsel. In the second pending petition for review, Gullledge-Forga challenges the court's rejection of that argument and its denial of her motions for reconsideration and late filing pursuant to Rule 32.1(f).

¶5 Gullledge-Forga identifies a total of eight issues in her two petitions for review.

In cause number 2 CA-CR 2009-0185-PR, the stated issues are:

- 1) Did the prosecution violate the terms of a plea agreement, sentencing order and due process by failing to provide an accounting?
- 2) Did the court err by dismissing the petition as untimely?
- 3) Was Petitioner sentenced in violation of the right to counsel given the failure to object to the restitution amount, investigate and object to "losses" attributable to another employee's theft, and by failing to make any effort to obtain an accounting after the sentencing occurred?
- 4) Was Petitioner sentenced in violation of the 6th Amendment right to counsel by failing to assert and prove additional mitigating evidence?

5) Was there *Strickland* error<sup>1</sup> given the failure to adequately explore and advise regarding an initial plea offer?

6) Does Petitioner's exemplary conduct in DOC confirm prejudice, and/or raise the need for a resentencing?

The issues identified in cause No. 2 CA-CR 2009-0231-PR are:

1) Did the court err as a matter of law, by finding Petitioner was responsible for not filing a timely Rule 32 Notice . . . ?

2) Did the court err . . . by declining to conduct an evidentiary hearing so that Petitioner could prove that the failure to file a timely Rule 32 Notice was not her responsibility?

¶6 Five of these eight issues we do not reach, as they were never considered by the trial court. *See* Ariz. R. Crim. P. 32.9(c) (aggrieved party “may petition . . . appellate court for review of the actions of the trial court”); *see also State v. Bolton*, 182 Ariz. 290, 299, 896 P.2d 830, 839 (1995) (“It is not the province of an appellate court to pass upon questions not acted upon by the court from which the appeal is taken.”), *quoting State v. Narten*, 99 Ariz. 116, 121, 407 P.2d 81, 84 (1965). Our review is therefore confined to the questions whether the court abused its discretion by dismissing the petition for review as untimely, by denying Gullede-Forga leave to file a delayed petition for post-conviction relief pursuant to Rule 32.1(f), and by doing so without first having held an evidentiary hearing.

¶7 Because the petition for post-conviction relief was so clearly untimely, we cannot say the trial court abused its discretion in dismissing the petition on that ground or in

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<sup>1</sup>*Strickland v. Washington*, 466 U.S. 668 (1984).

denying the subsequent motions to reconsider its ruling. Nor can we say it abused its discretion in denying Gullledge-Forga's request for leave to seek post-conviction relief years after the time for doing so had expired.

¶8 The central issues raised in Gullledge-Forga's untimely petition concerned the amount of restitution she had been ordered to pay and the alleged need for a subsequent accounting of offsets against the original amount ordered. Although Gullledge-Forga now contends she "was never informed that she should have concerns about the accounting" nor advised "to object and obtain an accounting prior to February 14, 2002[,] in order to offset restitution," her contentions are undermined by the transcript of her sentencing hearing. It reflects the following comments by defense counsel and the prosecutor in Gullledge-Forga's presence at the conclusion of the hearing:

[Defense counsel]: Your Honor, just one more thing for the record. The plea agreement states that the restitution is subject to offsets. Ms. Forga was involved in a forfeiture. The items seized are to be given to [one of the victims] for sale and the restitution to him [is] subject to offsets.

[Prosecutor]: Your Honor, that's correct. The forfeiture items have not actually been released yet. They're going to be released after sentencing here. As soon as those items are [sold], we'll get those amounts and report it to the clerk's office.

¶9 As a result, we cannot say the trial court abused its discretion in denying Gullledge-Forga's request for leave to seek post-conviction relief seven years after the time allowed for doing so had expired. As the court noted, Gullledge-Forga had received and signed a notice of her post-conviction rights, and the court was at liberty to discount or disbelieve the various explanations Gullledge-Forga offered in 2009 for not having sought

post-conviction relief timely in 2001 or 2002. The available record supports the court’s decision, which was tantamount to a finding that Gullledge-Forga had failed to present a colorable claim under Rule 32.1(f) and therefore was not entitled to an evidentiary hearing. *See* Ariz. R. Crim. P. 32.6(c) (court may summarily dismiss petition for post-conviction relief if it “determines that no . . . claim presents a material issue of fact or law which would entitle the defendant to relief . . . and that no purpose would be served by any further proceedings”); *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (“The defendant is entitled to an evidentiary hearing only when he presents a colorable claim—one that, if the allegations are true, might have changed the outcome.”).

¶10 Finding no abuse of the trial court’s discretion in any of the challenged rulings, *see Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d at 67, we grant the petitions for review but deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge